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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 87.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES EMMET CUMBERLAND, AN INFANT, BY HIS NEXT FRIEND, CHARLES J. CUMBERLAND.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

I.

THE COURT BELOW DID NOT ERR IN REFUSING TO HOLD AS A MATTER OF LAW THAT THE PLAINTIFF WAS BOUND TO EXERCISE THE SAME DEGREE OF CARE AND PRUDENCE THAT AN ADULT WOULD HAVE BEEN BOUND TO EXERCISE UNDER LIKE CIRCUMSTANCES.

The plaintiff was born August 26, 1882 (15). The accident occurred December 10, 1894, so that at the time he was a little over twelve years of age. There was abundant

testimony, however, tending to show that he had the capacity only of a child of little more than half his years. His own examination indicated his mental deficiencies. He could not tell correctly the number of the house in which he lived, either at the time of the trial or at the time of the accident (6, 9, 15). He had to be led to enable him to state with any accuracy the time of day when the accident occurred (6, 7). Although perfectly familiar with the locality, he thought that the end of the bridge is towards the north from where he was injured, when in fact it is southwest (7). He stated with great composure that he went to school for four or five years, but did not learn to either read or write (12). He was positive that the electric light at this end of the bridge was not lighted at the time of the accident (13), whereas every other witness in the case testified, and the admitted fact was, that it was lighted. In addition to this, the court and jury below had an opportunity to see and hear the plaintiff testify, and could judge something from his appearance. Two witnesses who had known him well all his life, and another who had been his school teacher for several months just prior to the accident, testified, in substance, that at that time he had the mental capacity of a child of six or seven years of age (Faunce, 16; Corcoran, 17, 18; Mrs. Campbell, 18).

It is quite true, as counsel for the appellant insist, that the boy's father testified that before the accident his son was a bright lad, and that the father attributed the boy's mental weakness to his injuries (15). But it need scarcely be said that upon all the evidence it was for the jury to say what was the plaintiff's mental capacity at the time of the accident.

On this point the only instruction that was given to the jury was the second instruction asked by the plaintiff's counsel (31). That instruction left it to the jury to say, upon the whole evidence, whether the plaintiff had exercised the degree of care which might reasonably be expected

of one of his age and capacity. It was taken almost *verbatim* from the opinion of this court in Railroad Co. *vs.* Gladmon, 15 Wall., 401–408. It is substantially what this court subsequently held to be the law in Railroad Co. *vs.* Stout, 17 Wall., 660. Railroad Co. *vs.* Gladmon was followed by the Court of Appeals of the District in Met. R. R. Co. *vs.* Falvey, 5 App. Cas. D. C., 176, and in Reiners *vs.* W. & G. R. Co., 9 App. Cas. D. C., 19.

The precise question which is involved here—whether it was for the court or the jury to say what was the mental capacity of the plaintiff and what the corresponding degree of care required of him—was submitted to the Court of Appeals and decided against the appellant's contention in B. & P. R. Co. *vs.* Webster, 6 App. Cas. D. C., 182.

In view of the repeated adjudications of the question by this court, it seems to be unnecessary to review the cases in the State courts. It will be found, however, upon an examination of the cases which are cited on pages 5 and 6 of the appellant's brief, that such of them as bear upon the question at all are against the proposition in favor of which they are cited. For instance, in the case of Nagle *vs.* R. Co., 88 Pa. St., 35, it was said that the degree of care which is to be exercised by a child under fourteen years of age is a matter for the determination of the jury in the particular case. In the passage which is quoted in the appellant's brief, the court simply held that when the child is over fourteen and there is no evidence as to its having less than the usual mental ability, it is presumed to be chargeable with the same degree of care as an adult; but the court also expressly says that where the child is over fourteen and there is evidence upon the subject, even then the question is one for the jury.

McMahon *vs.* R. Co., 39 Md., 451, 452, another of appellant's cases, is a strong authority against it.

Two recent and weighty cases to the same effect in other jurisdictions are Crane Elevator Co. *vs.* Lippert, 24 U. S. App., 186, which related to a child over fifteen years of age,

and Plumley *vs.* Birge, 124 Mass., 57, in which the infant concerned was thirteen years old.

II.

THE COURT DID NOT ERR IN OVERRULING THE MOTION MADE BY DEFENDANT'S COUNSEL TO DIRECT THE JURY TO RENDER A VERDICT FOR THE DEFENDANT.

This accident occurred about a quarter past five, on the evening of December 10, 1894 (6, 7, 15). "It was dark, rainy, foggy, and very cold" (Charles J. Cumberland, 15). "It was a dark, rainy, misty evening" (Motley, 16). "It was drizzly, misty weather, and it was getting dark" (Faunce, 17). It was so dark that, although the engineer and fireman on the locomotive that struck the boy had their eyes on him up to the time he stepped on the track right in front of the locomotive, they could not tell whether the moving object was a man, woman, boy, or girl, and could not see whether the object carried a ladder. (Bush, 21, 22; Maddox, 23, 24.)

The plaintiff testified that when he approached the track he looked both ways to see if the train was coming, and kept looking until he got almost on the track (7, 9, 10). A train was passing, or had just passed, on the north track, going south toward the bridge, the rear end of that train passing the place where the boy was just about the time the locomotive of the train that struck him reached him (25, 26, 27). The bell of the engine hauling this south-bound train was ringing (26, 27). Two men at the switch between the boy and the bridge were shouting (24, 26). The engineer and fireman of the locomotive that struck the plaintiff joined in the shouting (21, 23). A number of vehicles that had just come over the bridge from the races on the Virginia side were rattling and rumbling over the cobble-stone pavement, and made such a noise that the shouting

could not be heard (27, 30). Even the telegraph operator, Beall, who was in his box, within a few feet of where the accident occurred, did not hear any of the shouting nor notice anything unusual until he heard the engineer of the construction train putting on his brakes (30). The engine of the construction train was in front of the train, but was itself backing. Its headlight was lighted, but was throwing its rays not to the front, but on the cars behind the locomotive (24). At the same end of the engine, and near this headlight, were two other lamps, which were also throwing their rays in the wrong direction (29). Standing where the boy was and looking toward the train, one looks directly at the brilliant electric light at the east or north end of the bridge, which was 400 feet distant and on a pole eighty feet in height (25, 26). The switchman Roby, who was standing by the switch-box, had a hand lamp in his hand (26). There were a number of other switch-lamps on the track near the switch-house, and there was a hand lamp with a dull light on the front end of the train, which was the back end of the locomotive (17). The map which was introduced in evidence by the defendant showed that the distance from the switch to 13½ street was 316½ feet. Roby, who was standing at the switch, testified that when the boy was struck he was about 70 feet from where he was standing (24). When the train was stopped the front of the train had reached the west line of 13½ street (22). Hence, if Roby was to be believed, the train had gone a distance of 246½ feet after it struck the boy. Roby was confirmed as to all his testimony by another witness for the defendant, one John R. Thomas (26), who had been conveniently employed by the defendant company about four months before the trial (27). The engineer who was in charge of the locomotive admitted that such a train, going at the rate of eight miles an hour, could have been stopped in 90 or 100 feet after the brakes were put on. After the train stopped the engineer asked the gateman if the train had struck anything (22, 28).

The regulations duly adopted by the Commissioners of the District of Columbia prior to the accident, and which were in force at the time, required that the defendant's road at the point where the accident occurred should be securely enclosed on both sides with a substantial fence. There was no fence there on either side, although one was subsequently placed on the north side (18). These regulations also required that between sunset and sunrise of each day "a headlight or other equivalent reflecting lantern" should be displayed upon the advancing end of every train of steam railroad cars (18). It was also provided that trains should not go in the city at a greater rate of speed than 12 miles an hour (18, 19). One of the witnesses testified that the train was going from 12 to 15 miles an hour (17).

Albert P. Motley, a witness for the plaintiff, testified that he was standing at the southeast corner of Thirteen-and-a-half street and Maryland avenue when this accident occurred; that he saw the plaintiff going from the lamp on the south side of Maryland avenue towards the railroad track, and that at that time he saw no train coming towards plaintiff. He said, further, that he saw the passenger train bound south pass, and this latter train was about opposite the boy when he saw him coming towards the track (16). From the map, which is a part of the record, it will be seen that this witness was looking directly towards the train which struck the plaintiff, and the fact that he did not see the train or any lights which indicated to him that a train was coming was cogent evidence on the question whether the plaintiff could have seen it when he looked in the same direction at the same time.

On these facts, it is respectfully submitted that the case is governed by Grand Trunk R. R. Co. *vs.* Ives, 144 U. S., 429, and Tex. & Pac. R. R. Co. *vs.* Gentry, 163 U. S., 353.

In Grand Trunk R. R. Co. *vs.* Ives, a man in a buggy in broad daylight drove in front of an approaching train at a railroad crossing and was killed. While still some distance

from the tracks he had stopped and listened, and while he was there a train on a parallel track passed by. Soon after it had passed and while the noise caused by it was still distinct, the deceased drove on. Just as he reached the track, and while apparently watching the train that had passed, he was struck by a train on one of the tracks of the defendant. In that case this court held that the trial court properly instructed the jury, among other things, that they should scrutinize the actions and doings of the deceased "under the light of the then situation; the nature and character of the crossing; the fact of the difficulty of observation; the time of day and the probability of danger from passing trains; the fact that there were other railroads side by side; that another train on one of these was actually approaching and passing; the noise and confusion; possibly the noise and confusion of signals, and every fact and circumstance bearing on the case to influence his conduct then and there under those circumstances, and not any other circumstances."

In Texas & Pacific R. R. Co. *vs.* Gentry (163 U. S., 353) it appeared that a railroad engineer in crossing in the nighttime tracks in a railroad yard, with which he was familiar, to go to his work was run over and killed by a switch-engine. This engine had a headlight, but there was a flat car in front of it, which was an unusual arrangement. It was held by this court that, as no one saw the accident, it was for the jury to say whether the deceased stopped, looked, and listened, the presumption being that he did; that it was a question for the jury whether the deceased was so blinded by the headlight that he could not see the flat car, and that it was a case for the application of the rule that where reasonable men may differ as to whether the party injured was guilty of negligence that question should be submitted to the jury.

On this point see also Railroad Co. *vs.* Carrington, 3 App. Cas. D. C., 112, 113; and B. & P. R. R. Co. *vs.* Webster, 6 App. Cas. D. C., 182, 197, 198.

III.

THE PLAINTIFF'S FIRST PRAYER WAS PROPERLY GRANTED.

As to the construction of the regulation requiring tracks to be fenced in when the grade is "approximately even with the adjacent surface," it seems reasonably clear that the intention was to require a fence where people would be likely, in the absence of it, to walk across the track. The testimony of the civil engineer, Brown, on behalf of the defendant was that at Thirteenth-and-a-half street the tracks and the curb are both flush with the street; *that half way down the square* the tracks are a foot and a half above the curb. He also said that the curb is four or five feet from the rails, and he says, apparently as a conclusion, that all this makes the tracks two feet and two inches above the roadway (20). This means that there was one step of a foot and a half from the tracks down to the adjoining pavement, and that four or five feet further on there was another step eight inches from the curb down to the roadway in the middle of the square. But this witness further testified that the place where the accident occurred was much less than half way down the square (see map); and Phillips, the gate-keeper at Thirteen-and-a-half street, testified that when the boy was struck he was only 90 feet from Thirteen-and-a-half street and 200 feet from Fourteenth street; so that, according to the testimony of this witness, he crossed the track at a point where it was nearly flush with the street.

Some criticism was made upon this part of the prayer in question because, it is said, it assumes as a fact that the regulation of the District Commissioners required a fence to be erected at the place where the accident occurred. There are two replies to this criticism. In the first place, upon the undisputed evidence in the case the track was "approximately even with the adjacent surface" within the meaning

of that phrase in the regulation of the District Commissioners (18). There was no evidence that on the south side, where the boy approached the tracks, there was any elevation of the track above the roadway. The defendant's engineer, Brown, who is the only witness upon this subject, produced a map, a copy of which is in the record, showing a curb line just north of the tracks extending from a point a short distance west of the curb line of Thirteen-and-a-half street to the "Fourteenth Street tower." But on the south side, near the point where the boy approached the tracks, there appears to be no curb except the usual curb between the sidewalk and the roadway proper. Brown testified, when "recalled and further examined," that the curb is about four or five feet away from the rails on each side of the main track. It is evident from an inspection of the map that, so far as the south side of the street is concerned, the curb to which he referred extended but a short distance west of Thirteen-and-a-half street and terminated not less than sixty feet from the place where the accident occurred.

It further appeared from the testimony of this engineer that after the accident occurred a fence was constructed by the railroad company on the north side of the track all the way from Thirteen and-a-half street to Fourteenth street, and that this fence was put up directly outside of the curb line (19, 20).

It is quite apparent that before the erection of the fence on the north side of the track there was nothing to deter persons from crossing the street at the point in question. Indeed, Roby, one of the witnesses for the defendant, testified that this boy had been engaged in lighting lamps down in that locality for about a year, "and was in the habit of crossing the tracks at that point" (24). From all this it is submitted that, as matter of law, the proper construction of the regulation in question required the erection of a fence on the north side of the track between Thirteen-and-a-half and Fourteenth streets. If a fence had been put on the

north side it would, of course, have prevented persons from crossing, and this accident never would have happened. As to the south side of the track, the excuse offered for not having a fence there was that it was impracticable because of the switch connecting the tracks running into the Richmond and Danville yard with the main tracks on Maryland avenue. It is obvious that this could not justify the railroad company in failing to have a fence anywhere on the south side of the square. It could at the most authorize only leaving a break in the fence of such width as would permit the proper use of the switch.

But in fact the court did leave it to the jury to decide whether or not the place was one at which a fence was required on either side of the track by the regulation in question. In the general charge to the jury the court, after reading the prayer under discussion, said:

"You will see, gentlemen, that that instruction recites four distinct suggestions, which you may consider in determining whether the defendant was guilty of negligence. The first one relates to the question of the fence. It is admitted that there was no fence here at this point. The regulation of the District Commissioners, which is in evidence before you, requires generally that there shall be a fence. The court does not undertake to instruct you, and you are not to so understand the instruction, that because there was no fence there you are therefore to find that the railroad company was guilty of negligence. The court does not so instruct you, but submits to your judgment whether the fact of the fence shall be considered negligence in this case. That is a question of fact; but in determining whether the absence of the fence is negligence, you are to consider that the Commissioners required it, and that they had the right to require it, and that it was not there. You have also the right to and should consider the evidence that has been given tending to show that it was impracticable to put a fence there, and you are to consider whether, under all the facts and circumstances of this case, considering the situation, the fact of not having a fence there shall be considered negligence on the part of the railroad company. If you

think it was impractical to build a fence there, and that they could not manage the road reasonably with a fence there, then it would not be negligence in not having it there, although the District Commissioners' regulations required it. The proper construction of that regulation is that the fence should be placed at all points where it was practicable to put it and not interfere with the operation of the road; and you will consider that regulation and the facts of this case in the light of that instruction I have given you. It is for you to say whether the absence of the fence is negligence under the circumstances of this case" (34, 35).

It is further objected to the plaintiff's first prayer that it was error to leave to the jury the question whether the hand lamp, which the evidence tended to show was on the tender, was substantially such a light as required by the regulations of the District Commissioners, or such a light as was requisite to give proper warning of the approach of the train. Counsel contend that this was a question of law for the court. A number of cases, two of them in this court, are cited by counsel for the railroad company in support of this proposition. We have examined all those cases and find that such of them as refer to the matter at all are directly against the proposition laid down by opposing counsel.

The evidence in the case as to this lamp was as follows: Faunce, a witness for the plaintiff, who was standing at the east end of the Long bridge when this train passed him, said that "there was not a regular headlight on the rear of the tender, which was then the forward end of the engine, but that there was a small white hand lamp hanging thereon, such as brakemen carry for signaling, and this was lighted and shining, but it was not a very bright light" (17). Bush, the engineer of the train which struck the plaintiff, and who was called as a witness for the defendant, testified that he saw the plaintiff just before he was struck; "that witness did not know whether it was a boy or girl or man or woman; that he knew it was a person of some kind; that the light they had in front did not throw an illumination

on the object so that he could tell whether it was a man or child" (22). Maddox, the fireman on this locomotive, and another of defendant's witnesses, testified "that the lamp on the tender would not shine in the direction from which the person was approaching the track; that it did not give a light in every direction; that it was swinging on a hook; that it would give a light straight in front and would not to the side" (24). Roby, another of defendant's witnesses, testified simply "that there was a hand lamp swinging on the advancing end of the tender" (25). Phillips, who for the defendant attended to the gate at Thirteen-and-a-half street, testified on behalf of the defendant "that the tender of the engine had a light on it like those used for signals; that it gave a tolerably fair light" (28).

It is respectfully submitted that upon this evidence the court might well have instructed the jury as matter of law that this hand lamp was insufficient to comply with the requirements of the regulation established by the District Commissioners that "between sunset and sunrise of each day a headlight or other equivalent reflecting lantern * * * shall be displayed upon the advancing end of every train" (18). It seems equally clear, without reference to the regulation, that the court might very properly have told the jury that ordinary care would have required that the railroad company should not back an engine along the streets of a city on such a night as the one in question without having any other light on the front of the train than a hand lamp such as switchmen and other trainmen habitually carry. A person seeing such a light coming up the track would not only not be warned by it, but would be misled by it. He would no more think that it indicated an approaching train than he would from seeing a similar lamp swinging in the hand of a switchman a few feet further away; but as to this part of the instruction, as well as to that part of it which related to the matter of the fence, the court carefully left the whole question to the jury, the part

of the charge bearing upon the matter of the sufficiency of the light being as follows:

"The next point that is submitted to your consideration on the question of negligence of the defendant is whether the light at the front end of the train was substantially such a light as was required by the regulations of the District Commissioners, given in evidence, or such a light as was requisite to give proper warning of the approach of the train. The regulation of the District Commissioners required a light of a particular character. It is not absolutely necessary that the light should be exactly like the light that the District Commissioners require. If it was substantially like it that would be a compliance with the regulations. And even if it was not substantially like it, yet, if you believe from the evidence that the light was a proper and sufficient one to give warning of the approaching train, it would not be negligence simply because it did not correspond with the kind of light that the Commissioners required, the object of that regulation of the Commissioners being that railroad companies should have a light that would be sufficient in kind and character to give warning of an approaching train. And if you find that the railroad company had such a light as that it would not be guilty of negligence, but if it had a light that was insufficient to give warning of the approaching train, then it would be negligence, and that is submitted for your consideration" (35).

As to whether there was any evidence in the case tending to show that the persons in charge of the engine drawing the train were not keeping a proper lookout, it is sufficient to say that the engineer himself testified that at the time of the accident his train was moving at the rate of about eight or ten miles an hour (21); that when moving at that rate it could be brought to a stop in about 90 or 100 feet (22); that the same witness testifies that when he stopped his engine after the accident the front end of the engine "was right flush with the west curb of Thirteen-and-a-half street, right where the gate begins" (22); that the defendant's switchman, Roby, testified for it that he was standing in front of the switch-house "and about 70 feet

from where the boy was struck" (24); and that according to the map which the defendant itself put in evidence the distance from the switch-house to Thirteen-and-a-half street was not less than 280 feet. Even if we take as the place where the boy was struck the place marked "Point of accident" on the map in question, we find, noting that the map is upon the scale of one inch to 20 feet, that the distance from that point to the gate is 129 feet. In addition to this it must be remembered that after the train stopped the engineer asked the gatekeeper whether he had struck anything, plainly indicating that neither he nor his fireman had seen the boy at all.

Finally, a fatal objection to all the points made as to the sufficiency of the prayer in question is that the objection was too general. The record shows that when the plaintiff's counsel presented this prayer and another, the defendant, by its counsel, objected to each of them; that the court overruled the objection and the defendant excepted. No specific defect in the prayer was pointed out. (See B. & P. R. Co. *vs.* Mackey, 157 U. S., 86; Bogk *vs.* Gassert, 149 U. S., 26, and cases there cited in the opinion.) It is not disputed that the first proposition contained in the prayer is unobjectionable. It simply informs the jury that if the plaintiff was injured by the negligence of the defendant or its agents he would be entitled to a verdict, unless the jury found from the evidence that his own negligence contributed to the injury.

AS TO THE ALLEGED VARIANCE BETWEEN THE PROOF AND THE DECLARATION.

One of the charges of negligence against the defendant contained in the declaration is "there was no light upon the rear part of said engine to indicate its approach," and that the defendant was negligent "in failing to place any light upon the rear part of said engine, which was being

backed along said Maryland avenue in the direction of the plaintiff, so as to indicate the approach of said engine." It appeared from the evidence of Faunce, one of the plaintiff's witnesses, and from the testimony of several of the defendant's witnesses, that there was upon that part of the locomotive which was in front as it backed into the city the hand lamp, the testimony in regard to which has been quoted on pages 11 and 12 of this brief. And the claim of the defendant's counsel here seems to be that the declaration alleged that there was no light, while the proof showed that there was a light, and that the plaintiff cannot recover upon the ground that it was an insufficient light.

It is to be observed that no objection was made to the evidence submitted by the plaintiff on this point. The proper time to object to such variance is when proof is offered of a different state of facts from that set out in the declaration. Nor was the point made when the plaintiff's testimony was closed or at the close of all the evidence. There was no motion to strike out the evidence as to the light. The point arises upon the refusal of the court to grant the defendant's sixth prayer (32), to the effect that if a lighted lantern was suspended on the end of the engine which was being backed into the city, then it is immaterial whether such lantern fulfilled the requirements of the police regulations on that subject.

As no objection had been made to the evidence as to the light that was on the engine and no motion had been made to strike it out, it is not competent for the defendant to raise the question of variance by a prayer of this kind.

The prayer was defective also because it relates only to the matter of the police regulation, whereas, without any reference to that regulation, it was a question for the jury whether or not the light was not insufficient for the purpose of giving warning to persons on or near the track of the approach of the train. All this becomes immaterial, however, for the reason that, as held by the trial court and

by the Court of Appeals, the reasonable meaning of the reference in the declaration to the light on the engine is, not that there was no light at all, but that there was no such light as would indicate its approach, and whether that light was sufficient, either under the police regulation or on general principles, the court carefully left to the jury to determine. and in Grayson v. Lynch, 163 U.S. 476

In the case of Nash *vs.* Towne, 5 Wall., 689, 700, an objection as to the variance between the proof and the pleadings was overruled upon the ground that, among other things, the differences, if any, "were not of a character which could have misled the defendants at the trial."

To the same effect are Railroad Co. *vs.* Hunter, 6 App. Cas. D. C., 288, 308, and Willey *vs.* Boston Electric Light Co., 168 Mass., 40.

In this case it is apparent that the defendant company and its agents in charge of the train could not have been misled as to the character of the light on the train by the averments of the declaration, because they had charge of those lights and because those agents were the persons who placed the light in question upon the tender.

A. S. Worthington,
Attorney for Defendant in Error.

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vs.

CHARLES EMMET CUMBERLAND, AN INFANT, BY HIS NEXT FRIEND, CHARLES J. CUMBERLAND.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

The principal brief for the defendant in error was printed when it appeared that this case was about to be reached for argument and before the counsel for the defendant in error had received the brief of the plaintiff in error. He had been furnished with proof sheets of a proposed brief for the plaintiff in error, but since his own brief was printed he has received that of the plaintiff in error and finds that some of the points contained in the proofs which were mainly relied upon in the court below have been abandoned

here, so that in his brief he appears to reply to arguments that are not relied upon now at all.

In addition to this, counsel for the plaintiff in error have here for the first time undertaken to make an objection to the case of the plaintiff below which was not made or suggested either in the trial court or at the hearing of the case in the Court of Appeals of the District. It is for the purpose of replying to this recently discovered objection that this supplemental brief is prepared.

An examination of the charge of the court to the jury, found on pages 33 to 38 of the record, and of the opinion of the Court of Appeals, beginning at page 43, will show that the objection referred to was not even made orally. In the brief which was used on behalf of the plaintiff in error in the Court of Appeals, one of the assignments of error was that the trial court erred in overruling the motion made by the defendant that upon the whole evidence the jury be directed to return a verdict for the defendant; but in the argument supporting this assignment the only proposition that was urged was that the evidence showed that the injured lad was guilty of contributory negligence.

This court has frequently decided that objections not going to the jurisdiction of the court below cannot be raised for the first time here. This is especially so when the case comes from an intermediate appellate tribunal.

In Montana Railway Company *vs.* Warren, 137 U. S., 348–351, Mr. Justice Brewer, delivering the opinion of this court, said:

"Error is alleged in the judgment of the supreme court of the Territory; and if, in all matters presented to it, its rulings were correct, it cannot be affirmed that its judgment was erroneous, because there were in the record matters not vital to the question of jurisdiction or the foundation of right, but simply of procedure, to which its attention was

not called, and in respect to which its judgment was not invoked. All such matters must be considered as waived by the complaining party. It would be an anomaly if a party feeling himself aggrieved by the rulings of a trial court could appeal to the supreme court of his Territory, and invoke its judgment on certain alleged errors; and, when defeated there, could transfer the judgment of that territorial supreme court to this, and ask a reversal here of its judgments on grounds involving mere matters of procedure in the prior trial, to which its attention was not directed. It is fundamental that when the judgment of a court is challenged in error, its rulings alone are open to consideration. Of course, if the trial court had no jurisdiction, that is a matter which is always open, and the attention of the court of last resort may be called thereto in the first instance; but mere matters of error may always be waived, and they are waived when the attention of the reviewing court is not called to them."

In Carr *vs.* Fife, 156 U. S., 494, 496, Mr. Justice Shiras, delivering the opinion of this court, said:

"The ninth specification of error complains of the refusal of the court below to remand the cause to the superior court of Pierce county upon the showing that, after the admission of the State of Washington, it had been stipulated by the counsel of the respective parties that said cause might be tried in said superior court. But the record shows that the reasons assigned in the court below for the motion to remand did not mention such a stipulation, and it is out of time and place to urge it in this court."

And in Boston & Albany R. R. Co. *vs.* O'Reilly, 158 U. S., 334, 335, Mr. Justice Shiras, delivering the opinion of this court, said:

"The first objection urged to the admission of this evidence is, that it went to show special damage caused to the plaintiff by the loss and interruption of his business, whereas there were no allegations of such special damage contained in the declaration. It does not appear, however, that objection was specifically made to the evidence on the ground that the declaration contained no allegations of the specia

damage sought to be shown; and it is perfectly well settled in this court that where a case has gone to a hearing, testimony been admitted to a jury under objection, but without stating any reasons for the objection, and a verdict rendered, with judgment on the verdict, the losing party cannot, in the appellate court, state, for the first time, a reason for that objection which would make it good (Roberts *vs.* Graham, 6 Wall., 578; Patrick *vs.* Graham, 132 U. S., 627)."

Other recent cases, holding under a variety of circumstances that objections not made in the courts below are waived, are—

Haws *vs.* Victoria Copper Mining Co., 160 U. S., 314;
Martin's Admr. *vs.* B. & O. R. Co., 151 U. S., 673, 687;
Lloyd *vs.* Preston, 146 U. S., 630–645;
San Pedro, &c., Co. *vs.* U. S., 146 U. S., 136, and
Topliff *vs.* Topliff, 145 U. S., 156–173.

The new point upon which, judging from their brief, counsel for the plaintiff in error seem principally to rely in this court, but which was not made or suggested in any form in either of the courts below, is that the lad who lost his arm in the accident which is the subject-matter of the suit was a trespasser upon the railroad company's tracks; and, further, that, being a trespasser, the railroad company was under no obligation to him at the time and place when he was injured, to use due care or any care in running its train; that it could only be liable if after its servants had discovered him on the track they failed to use reasonable efforts to stop the train before it struck him, and that there was no evidence tending to show that such efforts were not made.

For the purposes of their argument, counsel for plaintiff in error in their brief assume that it is undisputed that the defendant in error "attempted to cross the tracks *midway* between Thirteen-and-a-half and Fourteenth streets, at a place where people were not accustomed to cross, and where

it was difficult to cross because the tracks were greatly elevated above the level of the street." But, in the first place, there was great uncertainty as to just at what point between Thirteen-and-a-half and Fourteenth streets the lad was struck by the train. Bush, the engineer, testified for the plaintiff in error, "that the accident happened about sixty feet west of Thirteen-and-a-half street" (21). He also testified that the train ran only eighty or ninety feet after he reversed his engine, and that when it stopped the front end of the engine "was right flush with the west curb of Thirteen-and-a-half street" (22).

Maddox, the fireman, testified for the railroad company that the engineer stopped the train as quickly as he could after they saw the defendant in error step on the track, and that after the engine was reversed "it moved about the length of an engine, which is between 55 and 60 feet" (23). The conductor of the train, Devears, another of the witnesses on behalf of the plaintiff in error, testified that after he felt the jar of the air brakes the train "appeared to him to have gone about sixty feet" (24).

The counsel for the plaintiff in error assume these statements to be true, and say, on page 9 of their brief, "The distance the train moved after the boy was struck, therefore, was the length of the engine, tender, and pilot taken together." Yet, when they discuss the law of the case, they take it for granted that the accident happened midway between Thirteen-and-a-half and Fourteenth streets, which would be about a hundred feet further west.

There is evidence in the case tending to show that the accident did occur about midway between Thirteen-and-a-half and Fourteenth streets. And according to the testimony of Robey and Thomas, both witnesses for the plaintiff in error, when the boy was struck he was only 65 or 70 feet from where they were standing, near the "switchman's box." An examination of the map will show that these two men were opposite Fourteenth street, and that they were

over 300 feet from Thirteen-and-a-half street; so that, according to their testimony, when the lad was struck by the train he was nearly 250 feet from Thirteen-and-a-half street.

Opposing counsel are endeavoring to show that the railroad tracks where the accident occurred are elevated above the grade of the street. On page 8 of the principal brief for the defendant in error it is shown that there is no evidence to justify this conclusion; and now it is seen that to obtain any foundation whatever for this argument counsel are obliged to discard two-thirds of the evidence as to the place where the train struck the boy, and that a large part of the evidence to which they so shut their eyes they, in another part of their brief, assume to be true.

The only evidence in the case as to the elevation of the tracks above the surface of the street was that of the plaintiff in error's witness Brown, and he testified that the tracks and curb were both flush with the street at Thirteen-and-a-half street (20). He does not fix the elevation of the tracks at any point except "half way down the square," and his testimony and the map together show that on the *north* side of the street, midway of the block, there was one step up eight inches to the curb and another of one foot and a half to the level of the tracks (20). On the south side, except for a short distance near Thirteen and-a-half street, there is no curb, except the usual curb between the sidewalk and the roadway, and no elevation of the tracks above the roadway. The map in evidence shows that the whole south side of Maryland avenue outside of the sidewalk, from Thirteen-and-a-half street to Fourteenth street, is occupied by the main tracks and the switches. It is idle, therefore, to argue that there are "elevated tracks" in the middle of the avenue and a roadway on each side from which the plaintiff in error had to mount to the tracks.

Neither are opposing counsel justified by anything in the evidence in saying that the place in question was one "where people were not accustomed to cross." The only

evidence on that subject is that the defendant in error was in the habit of crossing the tracks at that point (Robey, 24).

We submit that on this point this case is not to be distinguished from Railroad Company *vs.* Gladmon, 15 Wall., 401, and Railroad Company *vs.* Stout, 17 Wall., 660. In the former case, a boy seven years old, while attempting to run across the track of the defendant company in front of an approaching car, was run down by the car or the car horses. In Railroad Company *vs.* Stout, a boy six years of age was injured while playing with other children with a railroad "turn-table."

But even in the State courts the position taken by opposing counsel is wholly unsupported.

The cases cited by them on this point, so far as they apply to the facts of the case at bar, are against their contention. For instance, they quote from three Alabama cases. In one of these—Glass *vs.* Memphis & Charleston R. Co., 94 Ala., 587—the court say:

"It is not negligence in itself for one to *cross over* a railroad track wherever he may have occasion to do so. Before making the attempt, however, he must know that no train, engine or car is approaching in such proximity as to render the undertaking dangerous. If he fail to use his senses to this end—if, ordinarily, he omit to stop and look and listen for trains before going upon the track for the purpose of passing over it—his act in so doing is a negligent one *per se;* and if injury result to one thus on the track in consequence of not having taken this precaution, enjoined upon him by the commonest dictate of prudence and care, it is well settled in our jurisprudence that he cannot recover for the mere negligence of the railway company (*L. & N. R. R. Co. vs. Webb*, 90 Ala., 185; *Leak vs. Ga. Pac. Railway Co., ib.*, 161). And it follows, of course, that one having this right, with this care and caution, to cross the track of a railway whenever and wherever he has occasion to be on the other side of it, who takes this precaution, goes on the track for the purpose of crossing it with all the assurance his senses, properly exercised, can give him that it is safe to do

so, and yet from some cause against which he could not guard is injured, he may recover; for the law does not contemplate that railroads, road-beds, and tracks shall impede travelers, whether along highways or across country, any more than their physical conformation may of necessity involve, and while the traveler may be negligent in attempting to cross without proper circumspection, he is never a trespasser, because he is never without this qualified right to cross over."

In Montgomery's Executors *vs.* R. R. Co., 97 Ala., 308, another case relied upon by plaintiff in error, the same court say:

"It was open to inference by the jury on this evidence that deceased was in the act of *crossing* the track and was not getting on it for the purpose of proceeding along its course, when he fell; and if so, he was not a trespasser (*Glass vs. Memphis & Charleston R. R. Co., supra*). But though he was not a trespasser, he might well have been guilty of such contributory negligence in attempting to cross the track in front of the moving tender, if it was moving, or so near to it, conceding it to have been stationary, as that there was danger of its being put in motion and striking him before he could effect the crossing, as would be a complete defense to the action. And whether he was guilty of negligence, thus proximately contributing to the result complained of was manifestly a question for the jury and was properly submitted to their determination in the charges given."

(As opposing counsel have cited these cases from Alabama, it may not be amiss to refer to Railroad Co. *vs.* Shearer, 58 Ala., 672, and Railroad Co. *vs.* Donovan, 84 Ala., 141–147. In the first of these cases it was held that where a train of cars was moving backwards within the limits of an incorporated town while the deceased was walking on the track in the same direction as the moving train and no person was stationed to keep a lookout, and the cars ran over and killed the deceased, that the company was guilty of negligence and that the administratrix was entitled to

recover. In the second case it was held that it is negligence in a railroad company to run a train of cars in a town at a greater speed than the city ordinances allow, and that if injury result, even to trespassers, the railroad company is liable. In that case a child under ten years of age was injured while crossing the tracks at a place where he was accustomed to cross in carrying his father's dinner to him and returning home.)

Another of the cases principally relied upon by counsel for the plaintiff in error is Nicholson *vs.* Erie Railway Co., 41 New York, 533. In that case the court say:

"*If the point where the intestate was killed had been a public highway*, or if at the time he had been a passenger in a car upon the main track, and he had been injured by collision with the cars coming down the branch track, or if in any other way he had been not only lawfully, but in the exercise of a right at that point, the defendant would have owed him a duty to see that the cars upon the branch track were properly secured."

In the case of Johnson *vs.* B. & M. R. R. Co., 125 Mass., 75, cited by opposing counsel, the plaintiff was injured while crossing the defendant's tracks between two stations. There is nothing, either in the statement of the case, the briefs of counsel, or the opinion of the court, to suggest that the place of crossing was on a highway or a place that was at all used by the public.

In Mason *vs.* Mo. Pacific R. R. Co., 27 Kan., 83, from the opinion in which case counsel for the plaintiff in error quote on page 14 of their brief, Chief Justice Horton, who delivered the opinion of the court, expressly says:

"It cannot be well said that such trestle-work and bridge as constructed were either in law or in fact a public street."

The case in 5 Kansas, 98 (U. P. R. Co. *vs.* Rollins), cited in the same connection, grew out of the killing of some

cattle which were grazing on the prairie and had strayed upon the defendant's tracks.

In the next case cited in the brief of opposing counsel, Baltimore, etc., R. Co. *vs.* Depew, 40 Ohio St., 121, the plaintiff stepped on the railroad track just in front of a standing train and walked *along the track* in the direction in which the train was headed. The train started, came up behind him, and injured him. The court did not hold that he was a trespasser, but that he was guilty of contributory negligence in not looking out for the train; and even under those circumstances the court declined to say that the trial judge should have taken the case from the jury.

After referring to the foregoing cases counsel for plaintiff in error say: "To like effect are the following cases," and give a list of thirty-three cases. If the cases in this list are to the same effect as those above mentioned, their only application to this case would be to show that since the boy who was injured was *crossing* a railroad track on a *highway* he was not a trespasser, and the railroad company could not on that account escape, if while using reasonable care under all the circumstances he was run down by a locomotive backing into the city without a headlight.

We have examined the cases in this list, however, and find that in nearly all of them the injured person was *walking along the track*, and was struck by a train approaching him from behind. This was so in R. R. Co. *vs.* Goldsmith, 47 Ind., 43; McClaren *vs.* R. Co., 83 Ind., 319; Palmer *vs.* R. R. Co., 112 Ind., 250; Tenenbrock *vs.* R. Co., 59 Cal., 269; Toomey *vs.* R. R. Co., 86 Cal., 374; Ill. Central R. R. Co. *vs.* Godfrey, 71 Ill., 500; Ill. Central R. R. Co. *vs.* Hetherington, 83 Ill., 510; R. R. Co. *vs.* Zoffinger, 10 Ill. App., 252; Barker *vs.* R. R. Co., 98 Mo., 50; B. & O. R. Co. *vs.* Allison, 62 Md., 479; Candelaria *vs.* R. Co., 27 Pac. Rep., 497, and Spicer *vs.* C. & O. R. Co., 34 W. Va., 514.

In the case of Moore *vs.* Pa. R. R. Co., 99 Pa. St., 301, which seems to be much relied upon by adverse counsel, a boy ten

years old who was walking along the track in a town, on the ends of the ties or sleepers, was run down and killed by a train which came up behind him, which was running at a very rapid rate of speed and which gave no warning by whistle or other signal. In most jurisdictions, upon this state of facts, the question of the defendant's negligence would have had to be submitted to the jury. The rule in Pennsylvania is stricter, perhaps, against supposed trespassers than in any other State, and the court held that there should have been a verdict for the defendant. Yet even in this case the court say of the deceased:

"He was not on the track at a public crossing, nor was he in the act of crossing. *It is true that the railroad track at this place was laid upon the bed of a public street and hence the right to cross it was not limited to the highway or street crossing.* But the boy was walking along the track and not across it when he was struck."

Of the seven judges who sat in this case two, Trunkey and Sterett, JJ., dissented.

As to the other cases on the list, in Dull *vs.* R. Co., 52 N. E. Rep., 1013 (Indiana), the child who was injured was *standing* on a railroad track; in Messer *vs.* R. Co., 68 Ia., 602, the boy who was injured was playing on a railroad track; in Wright *vs.* B. & M. R. Co., 129 Mass., 440, the injured person was crossing the railroad tracks from one station to another at a place where the tracks were not in any highway; in Morrisey *vs.* Eastern R. Co., 126 Mass., 377, the boy who was injured was playing on the track, and that, too, in a place which was not in any highway; in Mugford *vs.* B. & M. R. Co., 52 N. E. Rep., 1078, a boy who was stealing a ride on a freight car was ordered by the brakeman to jump off, and in jumping got under the car and was hurt. In Flower *vs.* Pa. R. Co., 67 Pa. St., 210, a boy who was injured climbed on a tender, and rolled off when it started. In Duff *vs.* R.

Co., 91 Pa. St., 458, a boy who was selling papers on a train was injured—just how does not appear. In R. Co. *vs.* Schwindling, 102 Pa. St., 258, the boy who was injured was loitering on the platform of a station, watching trains go by. In McMullen *vs.* R. Co., 132 Pa. St., 107, the boy who was injured was lying on the tracks between two cars, which were coupled together. In Cauley *vs.* R. Co., 95 Pa. St., 398, the child whose injuries were the subject-matter of the action had been playing on the cars, and when jumping off, pursuant to the order to that effect, he fell under the car and was hurt; and in Beers *vs.* R. Co., 19 Conn., 566, cattle which had strayed on the track were injured.

It would seem that if this court is to be asked to revise its well-settled decisions upon the authority of cases in State courts, counsel should be able to refer it to cases in those courts, the facts of which approach a little more closely those upon which this court rendered the decisions which were followed by the courts below in the case at bar.

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